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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

JAN 11 1995

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| Amendment to the Commission's Rules | ) | WT Docket No. 95-157 |
| Regarding a Plan for Sharing        | ) | RM 8643              |
| the Costs of Microwave Relocation   | ) |                      |

**REPLY COMMENTS OF OMNIPPOINT COMMUNICATIONS, INC.**

Omnipoint Communications, Inc. ("Omnipoint") by its attorneys, files this Reply to the comments submitted in the above-captioned proceeding. Omnipoint and almost all other commenters generally endorse the Commission's proposed cost-sharing rules. While Omnipoint and other commenters offer modifications on the details of the plan, it is just as important for the Commission to act expeditiously to set the cost-sharing rules so that microwave relocation and deployment of PCS can proceed in a timely manner.

In addition, because microwave incumbents have and will continue to abuse the voluntary negotiation process, the Commission should take immediate corrective action. Omnipoint recommends that the Commission replace the voluntary and mandatory negotiation scheme with a single, one-year mandatory relocation period.

**I. The Commission Should Require Mandatory Relocation Within One Year.**

Many commenters, including Omnipoint, have described in detail the abusive tactics that some microwave incumbents have taken during the ongoing voluntary relocation period. *See*, Comments of PCIA at 2-11, attached exhibits; Comments of CTIA at Exhibit I; Comments of Sprint Telecommunications Venture at 4-7; Comments of AT&T Wireless Services, I at 3, 15;

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Comments of PCS PrimeCo, L.P. at 16. Unfortunately, this situation is the result of the Commission's current relocation rules that were intended "to make spectrum available for emerging telecommunications technologies." Memorandum Opinion and Order, 9 FCC Rcd. 1943 (1994).

While that was the intent, the rules have in fact impeded orderly transition of the 2 GHz spectrum. The voluntary negotiation period provides incentive for the incumbent to value its consent to relocate not on the basis of the fair value of replacing its existing system, but on what it is worth to the PCS entrant for the incumbent to move -- their consultants are even encouraging this sort of valuation. Comments of Sprint, Attachments B and C. (Suffolk County memorandum values incumbent's spectrum at projected loss of revenue prior to relocation; UTC memorandum to incumbents values cost of monthly hold-out at \$5 million). In effect, the microwave incumbents are holding their own private auction for the public spectrum, with the A and B licensees as unwilling but captured bidders required to pay yet again for the use of the spectrum. This result was obviously not intended by Congress or the Commission, it is holding up the implementation of PCS, and it encourages incumbent licensees to act contrary to the public interest.

The microwave incumbent community has failed to present a valid explanation for their abusive conduct, or to explain why the Commission should not broadly remedy the situation. While the abusive actions have been public knowledge, and a matter of record at the Commission in this docket, most of the microwave incumbents commenting do not even justify these negotiating strategies. *See, e.g.*, Comments of UTC at 3-4 (UTC believes "current transition rules are working" and, ironically, accuses PCS operators of "money-lust"); Comments of Association of American Railroads at 15 (incumbent should be "free to negotiate or to refuse to negotiate during the voluntary negotiation period"), Comments of Industrial Telecommunications Association at 3-5 (opposes all restraints on voluntary period negotiations). American Gas Association claims that the negotiating process is "complex" and that microwave incumbents do

not wish to "extract greater financial rewards from new licensees." Comments of American Gas Association at 3. APCO claims that "there is no significant evidence that the introduction of PCS services to the public being impeded or that PCS licensees are being unfairly disadvantaged." Comments of APCO at 4. In contrast, the record compiled in this docket demonstrates beyond doubt that the current rules fail to accomplish the public interest objective of orderly transition, and allow microwave licenses to force "greenmail" from PCS entrants.

Several commenters offer useful solutions to the problem. *See, e.g.*, Comments of CTIA at 9 (FCC should adopt Canadian relocation plan -- two years voluntary negotiation and then, if no agreement, microwave incumbent pays full cost of relocation); Comments of AT&T at 15 (voluntary period should be reduced to one year and obligation to negotiate in "good faith" applies during entire period). Omnipoint believes that the essential flaw in the current scheme is that it rewards the microwave incumbent for *withholding* its consent to relocate, even after the PCS operator has offered "comparable facilities" for the links to be relocated. To remedy this, the Commission should limit the transition to a reasonable period of time for the PCS relocater and the microwave incumbent to determine a plan for relocation and "comparable facilities." The microwave incumbent should be obligated to negotiate in "good faith" during this time, *i.e.*, it should be obligated to accept an offer of "comparable facilities." After that period has ended, the incumbent's 2 GHz license should be revoked. Omnipoint believes that a one-year period, beginning on the date that the relocater has sent written notification to the microwave incumbent, is ample time for the two parties to work out an acceptable solution and install "comparable facilities." *See* Comments of PCIA at 11-15 (FCC should replace relocation periods with single mandatory one-year period); Comments of GO Communications at 7 (same). After that period, if it does not voluntarily accept the "comparable facilities" the Commission should revoke the incumbent's license.

These modifications to the voluntary period will have no adverse impact on the microwave incumbents who act in a reasonable and good-faith manner. As PCIA and others

pointed out, the current relocation rules provide the microwave with full reimbursement, and all reasonable costs of relocation are covered. 47 C.F.R. § 94.59(c); Comments of PCIA at 11-12. Once the "greenmail" issues are eliminated, the relocation process should not be nearly as complicated or as difficult as microwave incumbents suggest. For example, the Commission has already reallocated five bands above 3 GHz for the purposes of accommodating microwave incumbents. Second Report and Order, 9 FCC Rcd. 6495 (1993). In particular, the Commission anticipated that relocation to 6 GHz "will be the primary relocation band for 2 GHz licensees;" the modified channel plan suits the needs of a variety of relocated microwave incumbents. Id. at 6506-07. Therefore, expeditious and low cost relocation to 6 GHz should be the norm, where such relocation is technically feasible.

Finally, while the existing voluntary and mandatory negotiation periods were "the product of extensive comment and deliberation prior to the initial licensing of PCS," NPRM at ¶ 3, some actual negotiations that have occurred *after* that rulemaking process demonstrate that the rules often do not serve the public interest. In fact, many microwave incumbents, using their leverage under the voluntary negotiation rules, have slowed the relocation process in order to obtain private gain beyond all costs of relocation. The Commission must not ignore these issues and should take remedial action. FCC v. WNCN Listeners Guild, 450 U.S. 582, 603 (1984) ("the Commission should be alert to the consequences of its policies and should stand ready to alter its rule if necessary to serve the public interest more fully."); Geller v. FCC, 610 F.2d 973, 979 (D.C. Cir. 1979) ("the agency cannot sidestep a reexamination of particular regulations when abnormal circumstances make that course imperative"). Also, given the enormous sums paid to the government by Block A and B licensees (and that being bid by Block C applicants) for the right to operate at 2 GHz, the Commission should ensure that these parties' reasonable expectations for use of that spectrum are met.

## **II. Installment Payments for Entrepreneurs Are In the Public Interest.**

Based on our review of the comments, no party objected to the concept of permitting entrepreneur PCS licensees to pay their reimbursement obligations in accordance with the PCS entrepreneur band installment plan, 47 C.F.R. § 24.711. Those commenting supported installment payments for entrepreneur PCS licensees. Comments of Bell South at 19; Comments of PCIA at 38; Comments of Carolina PCS I at 1; Comments of DCR at 8-9; Comments of GO Communications Corp. at 5-6; Comments of U.S. Airwaves Inc. at 7-8; *compare*, Comments of Iowa L.P. 136 at 3 (small businesses should not be required to pay any relocation costs during mandatory period). Omnipoint continues to endorse the Commission's plan for installment payments for all PCS licensees that qualify as "entrepreneurs" or "small businesses."

Further, Omnipoint urges the Commission to clarify that, as a "small business," Omnipoint would be entitled to pay in installment payments the reimbursement obligations incurred from its New York MTA operations. In particular, Omnipoint should be entitled to an installment plan set out for Block C PCS "small business" entrepreneurs that includes a ten-year term with interest-only for the first six years and interest and principal amortized over the last four years, and the interest rate set at the ten-year T-bill rate on the date the reimbursement obligation arises. *See*, 47 C.F.R. § 24.711(b)(3).

## **III. The Commission Should Adopt the Proximity Threshold, With Exceptions.**

Omnipoint agrees with PCS PrimeCo, GTE, and others that the Proximity Threshold is a good proxy for an actual interference analysis using TIA Bulletin 10-F, as proposed in the NPRM at ¶ 52. The Proximity Threshold will greatly simplify the cost allocation process by establishing definitive geographic borders around the relocated microwave links, aiding both the relocater and the subsequent PCS licensees in determining their obligations and rights.

However, like any simplifying proxy, the Proximity Threshold has its limitations which should be taken into account. The general rule applying the Proximity Threshold should be

sufficiently flexible to allow PCS operators that clearly do not, in fact, interfere with the microwave link to be exempt from the reimbursement obligation. In general, a PCS operator that receives no benefit from the relocation should not be required to share in the relocation costs. The reimbursement scheme, after all, is meant to solve the "free rider" problem by recouping relocation costs from all PCS licensees that would have interfered with the microwave incumbent. The Proximity Threshold rules, designed to implement this policy objective, should not operate so rigidly as to assess obligations on licensees that have actually *avoided* interference.

Omnipoint believes that there should be three exceptions to the Proximity Threshold. First, where a PCS operator effectively deploys an advanced technology that avoids interference, the operator should not be treated as though it had deployed a less sophisticated system. This will encourage spectrum efficiency, investment in spectrally-efficient equipment, and further research for improved solutions to spectrum use. Second, if a PCS operator deploys a base station on one side of a mountain or other physical barrier which would otherwise prevent interference of the relocated microwave link on the other side, the PCS provider should not be liable for the costs of that relocation. Third, if a PCS operator operates only on certain bands of its licensed spectrum, and could have coexisted with a co-channel microwave incumbent that operated on other bands of the same licensed spectrum block, the PCS operator should not be required to share the relocation costs. The operator's reimbursement obligation should be triggered only when it deploys a system with channels in bands of the licensed spectrum block that would have interfered with the incumbent.

At a minimum, entrepreneur PCS licensees should be entitled to demonstrate an exemption from the reimbursement obligation where their deployed systems would not have interfered with the relocated incumbent. The Commission has recognized that these licensees face acute financial pressures and, by the staggered implementation of PCS, will enter the market after the Block A and B licensees. Because the entrepreneur licensee will face daunting barriers

to entry and tight financial budgets, it should not also be forced to make payments on reimbursement obligations to Block A and B licensees when the entrepreneur can show that it would not have interfered with the incumbent. Further, not allowing such an exemption would be contrary to the Congressional mandate for the Commission to encourage small business, minority, and women participation in PCS. 47 U.S.C. § 309(j)(4)(D).

Omnipoint recognizes that these proposed exemptions may create more opportunities for dispute between the PCS operators. However, the number of disputes will certainly be reduced if the Commission restricts the exemptions to entrepreneur licensees only. In addition, it should be the obligation of the PCS operator seeking the exemption to demonstrate its eligibility under the claimed exemption to the Clearinghouse. In this way, the simple rectangle approach of the Proximity Threshold can greatly expedite reimbursement issues in the vast majority of cases, while the exemptions maintain a measure of fairness in the system for PCS operators that would not, in fact, have interfered with the microwave link.

#### **IV. The Commission Should Cease All Licensing of Microwave Incumbents at 2 GHz.**

Omnipoint agrees with the commenters recommending that the Commission stop all primary and secondary licensing of microwave incumbents at 2 GHz. Comments of AT&T at 13; Comments of PCIA at 22. There is simply no continuing public interest rationale for granting either routine modifications (minor or major) or renewals of microwave licenses. *See*, Comments of Pacific Bell Mobile Services at 12-13 (no further primary status renewals after April 4, 1996). In addition, the Commission should revoke authorizations for microwave links that are not currently in use. These changes in the transition plan will encourage microwave incumbents to focus their efforts on relocating their systems out of the 2 GHz band.

#### **CONCLUSION**

Deployment of commercially viable and ubiquitous PCS systems depends on expeditious transition of 2 GHz to PCS use. Omnipoint encourages the Commission to amend its current

relocation rules and to adopt an equitable cost allocation mechanism so that PCS operators will be able to deliver viable and competitive service.

Respectfully submitted,

OMNIPOINT COMMUNICATIONS, INC.

By:   
Mark J. O'Connor

Piper & Marbury L.L.P.  
1200 19th Street, N.W.  
Seventh Floor  
Washington, D.C. 20036  
(202) 861-3900

Its Attorney

Date: January 11, 1996



**CERTIFICATE OF SERVICE**

I, Mark J. O'Connor, hereby certify that a copy of the foregoing "Reply Comments of Omnipoint Communications, Inc." was sent this 11th day of January, 1996, via first-class U.S. mail, postage pre-paid, to the following:

Jeffrey L. Clarke  
Counsel and Technical Advisor  
American Gas Ass'n  
1515 Wilson Boulevard  
Arlington, VA 22209

Thomas J. Keller  
Attorney for AAR  
Verner, Liipfert, Bernhard, McPherson, & Hand, Chartered  
901 15th Street, N.W.  
Washington, D.C. 20005

Cathleen A. Massey  
AT&T Wireless  
1150 Connecticut Ave., N.W.  
4th Floor  
Washington, D.C. 20036

Jim O. Llewellyn  
1155 Peachtree Street, N.E.  
Suite 1800  
Atlanta, GA 30309-2641

Jeanne M. Walsh  
Attorney for Carolina PCS I L.P.  
Kurtis and Assoc.  
2000 M Street, N.W.  
Suite 600  
Washington, D.C. 20036

Michael Altschul  
Vice President and General Counsel  
CTIA  
1250 Connecticut Ave., N.W.  
Suite 200  
Washington, D.C. 20036

William R. Richardson, Jr.  
Attorney for DCR  
Wilmer, Cutler and Pickering  
2445 M Street, N.W.  
Washington, D.C. 20037

Leo Fitzsimon  
Attorney for GO Communications  
201 N. Union St.  
Suite 410  
Alexandria, VA 22314

Andre J. Lachance  
Attorney for GTE  
1850 M Street, N.W.  
Suite 1200  
Washington, D.C. 20036

Frederick J. Day  
Attorney for ITA  
1110 N. Glebe Road  
Suite 500  
Arlington, VA 22201-5720

James U. Troup  
Attorney for Iowa L.P. 136  
Artes & Hadden  
1801 K Street, N.W.  
Suite 400K  
Washington, D.C. 20006-1301

Betsey Storer Granger  
Attorney for Pacific Bell  
4420 Rosewood Drive  
4th Floor, Building 2  
Pleasanton, CA 94588

Mark Golden  
Vice President - Industry Affairs  
PCIA  
1019 19th Street, N.W.  
Suite 1100  
Washington, D.C. 20036

William L. Roughton, Jr.  
PCS PrimeCo., L.P.  
1133 12th Street, N.W.  
Suite 850  
Washington, D.C. 20036

Kurt A. Wimmer  
Attorney for Sprint Telecommunications  
Covington & Burling  
1201 Pennsylvania Ave., N.W.  
Washington, D.C. 20044

Pamela W. Portin  
U.S. Airwaves Inc.  
10500 N.E. 8th Street  
Suite 625  
Bellevue, WA 98004

Jeffrey L. Sheldon  
UTC  
1140 Connecticut Ave., N.W.  
Suite 1140  
Washington, D.C. 20036

  
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Mark J. O'Connor